CH'NG LIAN ENG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NOS. 73/1981 & 74/1981]
9 DECEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Charge of rape - Whether trial Court justified in convicting accused - Denial by accused that sexual intercourse took place - Duty of trial Court - To determine at the end of defence case - Whether prosecution had proved beyond all reasonable doubt that sexual intercourse took place between accused and victim.*

CRIMINAL LAW AND PROCEDURE: *Power of Appeal Court to intervene - Appellant to show findings are unreasonable or cannot be supported having regard to the evidence.*

CRIMINAL LAW AND PROCEDURE: *Sentence - Mitigation - Victim inviting trouble in going out with the appellant at night - Sharing company in the privacy of a room - Commission of offence - 3½ years ago - Whether there are mitigating facts for reducing sentence.*

This was an appeal by the appellant against his conviction and sentence for an offence of rape of a girl aged 13 years and 11 months whereby he was convicted and sentenced to 3 years' imprisonment. The Public Prosecutor had also appealed against sentence alleging inadequacy.

The girl said that there were two acts of rape both at the Rest House, Penang, on two different nights in July 1979. As regards the first act, she was frightened into submission and was, therefore, not a consenting party, whereas, as to the second, she was a consenting party, having been seduced by the appellant, with a promise that he would divorce his wife and marry her. The appellant, however, denies the allegations against him and said that the case has been framed against him and that no sexual intercourse took place at any time.

Held:

[1] The learned President who had the inestimable advantage of seeing and hearing the girl and the appellant give their evidence, an advantage which is denied to the appellate Court, made very strong findings in favour of the girl's version whilst rejecting that of the appellant and gave his reasons for those findings.

[2] In the circumstances, sitting on appeal, the Court's powers to intervene are circumscribed by well settled authorities which show that unless the appellant can demonstrate that those findings were unreasonable or cannot be supported having regard to the evidence or are plainly wrong or perverse, the appeal must stand dismissed out of this Court.

[3] The Court, however, differed with the learned President on one point and that concerns his findings that there was no corroboration of the girl's evidence. In the Court's view, there was corroboration of the most potent kind in the shape of evidence of opportunity and disposition on the part of the appellant to have sexual intercourse with the girl.

[4] The Court's concluding observation on the appeal against conviction, was that when the appellant, a married man with two children and aged 23, chose to date a girl of 13, he was playing with fire and it was proverbial that those who play with fire should not complain if they get burnt. The appeal against conviction was dismissed.

[5] As to the sentence, the learned President had overlooked the mitigating facts that the girl was inviting trouble in going out with the appellant in his car at night knowing he was a married man and then being prepared to share his company in the privacy of a room in a Rest House. There was also a long interval of time which had elapsed since the commission of the offence - nearly 3½ years - and the appellant's good character both before and after conviction.

[6] In all circumstances, justice will be best served if the sentence was reduced to eight months. The Public Prosecutor's appeal against sentence was, in consequence, dismissed.

[Appeal against conviction dismissed. Sentence reduced to 8 months. Public Prosecutor's appeal against sentence dismissed.]

Cases referred to:
Haw Tua Tau v. PP [1981] 2 MLJ 49; [1981] CLJ (Rep) 11
Teng Kum Seng v. PP [1960] 26 MLJ 225
R. v. Renphrey [1964] Cr LR 671
Sapherson [1963] Cr LR 66

Legislation referred to:
Criminal Procedure Code, s. 422
Penal Code, s. 376

For the appellant - R. Rajasingam; M/s. R. Rajasingam & Co.
For the respondent - Mohd. Nordin Sulaiman, DPP

JUDGMENT

Edgar Joseph Jr J:

This appellant was convicted of rape of a girl aged 13 years and 11 months in contravention of s. 376 of the **Penal Code** and sentenced to three years' imprisonment. Against this conviction and sentence he has appealed. There is also an appeal by the Public Prosecutor alleging inadequacy of sentence.

It is unnecessary to set out the facts as these appear sufficiently from the judgment of the learned President.

Before me, the convictions have been attacked on a number of grounds, all of them raising questions of fact. They may be consolidated under one head, namely, that the circumstances of the case were such that it was wholly unsafe to convict on the uncorroborated testimony of the girl who, it was said, was not a witness of truth.

Now the issue in the Court below was simple. The girl said there were two acts of rape - both at the Rest House, Penang, on two different nights in July 1979. As regards the first of these acts, she was frightened into submission and was, therefore, not a consenting party, whereas, as to the second, she was a consenting party, having been seduced by the appellant, with a promise that he would divorce his wife and marry her.

The appellant, on the other hand, said that the case against him had been framed and that no sexual intercourse took place at any time. So the sole question which the learned President had to determine at the end of the defence case was whether or not the prosecution had proved beyond all reasonable doubt that sexual intercourse took place between the appellant and the girl at a time when she was under 14 (*Haw Tua Tau v. PP* [1981] CLJ (Rep) 11).

Since the charge merely alleged a single act of rape in July without specifying which of the two acts was charged, it was vague and confusing. However, as the appellant was represented and was clearly aware of what was charged against him and as his defence was one of a bare denial, I do not consider he was in any way prejudiced. Applying s. 422 of the Criminal Procedure Code I hold that the defect in the charge was cured and if any authority is needed I would refer to the case of *Teng Kum Seng v. PP* [1960] 26 MLJ 225. I shall, however, assume in the appellant's favour, that what was charged was the second alleged act of sexual intercourse which was with the girl's consent.

In a long and careful judgment, the learned President made very strong findings in favour of the girl's version whilst rejecting that of the appellant and went on to give his reasons for those findings. In the circumstances, sitting on appeal, my powers to intervene are circumscribed by well settled authorities which show that unless the appellant can demonstrate that those findings are unreasonable or cannot be supported having regard to the evidence or are plainly wrong or perverse, the appeal must stand dismissed out of this Court.

Mr. Rajasingam has taken me through the evidence with a tooth comb and at great length in an attempt to persuade me that the girl was not a witness of truth and inspite of his carping criticisms, I regret I find myself unable to agree with him. On an issue such as this so much depends upon the impression which the girl and the appellant made upon the learned President who had the inestimable advantage of seeing and hearing them give their evidence, an advantage which is denied to me.

I must, however, differ with the learned President on one point and that concerns his finding that there was no corroboration of the girl's evidence. In my view, there was corroboration of the most potent kind in the shape of evidence of opportunity and disposition on the part of the appellant to have sexual intercourse with the girl. I refer to the evidence of the appellant having dated the girl, a fact which he admitted, and love letters which passed between him and the girl. There was also a manifest lie on the part of appellant that his relationship with the girl was purely platonic.

My concluding observation on the appeal against conviction, is that when the appellant, a married man with two children and aged 23, chose to date a girl of 13, he was playing with fire and it is proverbial that those who play with fire should not complain if they get burnt.

The appeal against the conviction is dismissed.

The appellant is on firmer ground as regards his appeal against sentence. Whilst it is true that this was perhaps a case which involved the exploitation of an immature girl by an older man I cannot overlook the fact that the girl was inviting trouble in going out with the appellant in his car at night knowing he was married man and then being prepared to share his company in the privacy of a room in a Rest House. These mitigating facts were clearly overlooked by the learned President. There is also the long interval of time which has elapsed since the commission of the offence - nearly 3½ years - and the appellant's good character both before and after conviction. Moreover, this was not a case where the appellant chose to ignore the law knowing full well that this is a law for the protection of young girls against themselves *R. v. Renphrey* [1964] Cr. LR 671.

In *Sapherson* [1963] Cr LR 66, a married man aged 27 with several previous convictions and separated from his wife admitted several offences with a girl of 15. It was suggested that the girl was experienced and was the real instigator. The Court observed that "in view of the wide age discrepancy it was firmly of the view that this is a case for imprisonment" but the sentence of two years' imprisonment imposed by the trial Judge "was out of scale ... something in the nature of six months would have been more appropriate."

In all the circumstances, I think that justice will be best served if I reduce the sentence to eight months, which I hereby do. The Public Prosecutor's appeal against sentence is, in consequence, dismissed.

Also found at [1983] 1 CLJ 88